No. 11350.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MASTER LUBRICANTS COMPANY, a corporation,

Appellant,

vs.

GEORGE O. COOK and MINNIE M. COOK, Bankrupts, and IGNATIUS F. PARKER, Trustee of the Estate of Bankrupts,

Appellees.

BRIEF FOR APPELLEES.

GEORGE GARDNER,
811 H. W. Hellman Building, Los Angeles 13,
Attorney for Appellees.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

CASES.

No. 11350.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MASTER LUBRICANTS COMPANY, a corporation,

Appellant,

vs.

GEORGE O. COOK and MINNIE M. COOK, Bankrupts, and IGNATIUS F. PARKER, Trustee of the Estate of Bankrupts,

Appellees.

BRIEF FOR APPELLEES.

Statement of the Case.

The facts as stated by Appellant are approximately correct, except that Appellant attempts to make a point that the minor child had removed from the homestead and had been living with her mother about a week at the time the hearing was had (App. Br. p. 6, lines 8-13; p. 7, lines 7-11; p. 7, lines 24-27). We feel that all this is immaterial, and that the status of the property and the rights of all parties therein were fixed as of the date of bankruptcy, to-wit, June 13th, 1944, at which time it is apparent that the minor child was residing in the homesteaded property, with her father, George O. Cook. However, if the Court should feel that it is material, then we call attention to the fact that the absence of the minor from the

homestead was only temporary [Tr. p. 102, lines 25-27, and p. 105, lines 15-18], and that all of her personal belongings still remained in the homestead. [Tr. p. 103, lines 29-32, and p. 104, lines 1-11.]

Question to be Determined.

The controversy boils itself down to one simple question, to-wit: Does a decree of divorce between a husband and wife, which makes no mention or determination as to a homestead, put an end to the homestead WHEN THERE IS A MINOR CHILD INVOLVED?

Argument.

Counsel has cited numerous cases, but so far as we can see, there is not a single case on this question in which there was a minor child to be considered.

There is little doubt but that where the family relationship is completely severed by a decree of divorce, so that there is no longer any *family relationship* to be protected by the homestead, then and in that case the homestead falls. But what is a "family," and what is a "family relationship?"

The principal cases cited by the Appellant, to-wit, *Zanone v. Sprague*, 16 Cal. App. 333, and *Lang v. Lang*, 182 Cal. 765, were both cases in which there was no minor child, and therefore, when there was a decree of divorce, the family relationship ceased to exist; and therefore there was no one to be protected by the homestead. And it seems quite clear that such a distinction was recognized by the Courts in these cases, because in the *Lang* case the Court expressly based its ruling on the fact that there was no minor child involved. The Court bases its deci-

sion upon the fact that since there was no minor child involved, the family relationship between the husband and wife was severed by the decree of divorce and the qualities of the homestead estate were thereby destroyed; the inference seems clear that if there had been a minor child, the ruling would have been different. The Court says "no family, no homestead!" The inference seems clear that if there *is* a family, the homestead still endures.

And where there is a minor child of the parties, there still remains a "family" even though the husband and wife are divorced. It appears as the underlying note in all of the cases cited by Appellant, that the purpose of the homestead is to protect the "family," and that so long as there is a "family relationship" which is not severed by the divorce, the homestead remains to protect that "family." In the *Zanone* case, *supra,* at page 338, the Court says:

> "The 'family' for whose benefit the homestead was selected from the separate property of the husband having been destroyed by the decree of the Court divorcing the parties, the homestead necessarily ceased to exist *as to that family,* * * *" (Italics ours.)

In the present case, the "family" for whose benefit the homestead was originally selected, included Mr. and Mrs. Cook, *and their minor children.* When the Cooks were divorced, there still remained as a family, Mr. Cook and the minor daughter, who were then and there actually residing in the premises and using it as their home. So, the family for whose benefit the homestead was selected, still existed. Instead of a man, his wife, and their minor children, it consisted only of the man and his one minor daughter, but IT WAS STILL A FAMILY, and as such entitled to the protection of the homestead.

The case of *Walton v. Walton,* 59 Cal. App. (2d) 26, while not exactly in point, nevertheless shows what our California Courts believe to be the basic idea behind a homestead. At page 36, the Court quotes as follows:

> "The beneficient idea undoubtedly is to make and preserve for every family a shelter of a home, to be free, as long as husband or wife *or a minor child* (italics ours) shall live and occupy it, from the common vicissitudes of life."

The case of *Remley v. Remley,* 49 Cal. App. 489, holds that if a decree of divorce destroys a homestead, it is only the *final* decree which will have that effect; not the interlocutory. The final decree in the present case was July 1st, 1943. What was the condition on July 1st, 1943? The evidence discloses that on that date, Mr. Cook and his minor daughter were residing as a family, in the homesteaded property. Since the decree of divorce is silent as to any disposition of the homesteaded premises, we must consider whether or not on July 1st, 1943, the family relationship which the homestead was put on to protect, still existed, or whether because of the divorce there was no longer any family relationship to be protected. It seems to us that the answer obviously is that there still existed a family, to-wit, Mr. Cook and his minor daughter; and if there was still a family to be protected, then the law cited in the *Zanone* and *Lang* cases is not in point because the circumstances are different.

It must be remembered that the property in question was at all times, and still is, the joint property of Mr. and Mrs. Cook; they held, and still hold, as joint tenants, and not as tenants in common. The decree of divorce did not mention the property, or deal with it in any way, so

they were and still are, joint tenants. So, under the law, each of them owns the whole of the property, vested as of the date of the original deed, and subject only to the possibility that by the death of either the rights of the deceased one therein would terminate. So the homestead of each is a homestead upon the entire property, and not upon an undivided one-half interest as Appellant seeks to imply.

There is one case, *City Store v. Cofer,* 111 Cal. 482, in which a married woman filed a homestead upon her separate property for the benefit of herself and her husband; she obtained a divorce from him, and the property was not mentioned; a creditor levied upon the property on the theory that the homestead was vacated by the decree of divorce, but the Court held that the homestead was still valid. This particular case is cited by the Court in the case of *Zanone v. Sprague, supra,* at page 342, wherein the Court says:

> "Whether, under such circumstances, such property would still retain the essential characteristics of a homestead, so far as the 'former owner' is concerned, need not be decided here, although such has been declared to be the rule in this State . (City Store v. Cofer, 111 Cal. 482, 44 Pac. 168.)"

Summarizing, it seems to Appellees that there is no absolute California decision directly on the point of whether or not a decree of divorce in which no mention of homesteaded property is made, vacates a homestead WHEN THERE ARE MINOR CHILDREN INVOLVED. The nearest case, apparently, is the *Lang* case, *supra,* in which the Court lays down the rule that *in the absence of any minor child* a homestead is vacated by a decree of divorce in which

the property is not mentioned. By expressly making its ruling conditioned upon the fact that there was no minor child involved, it seems to us that inferentially the Court was stating that had there been a minor child involved, its ruling would have been different. And this is still further borne out by the fact that in all of the cases cited by Appellant, there was no minor child involved, and the "family relationship" which was severed by the divorce was only the family composed of the husband and wife, which naturally would cease to exist upon their divorce. Where there is a minor child, there still remains a "family" and a "family relationship" which is not severed by the divorce, and consequently a need for the protection of the homestead.

We respectfully submit that the judgment should be affirmed.

Respectfully submitted,

George Gardner,

Attorney for Appellees.